Supreme Court, U.S.
FILED
APR 2 2001
CLERK

(3)

No. 00-1194

IN THE

Supreme Court of the United States

SALLY CAMPBELL AND THE LOUISIANA CHRISTIAN COALITION,

Petitioners,

vs.

ST. TAMMANY PARISH SCHOOL BOARD, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

WALTER M. WEBER
AMERICAN CENTER FOR LAW & JUSTICE
5th Floor
1650 Diagonal Road
Alexandria, VA 22314
(703) 740-1450

ROBERT L. MARRERO
Bowes & Marrero
401 Whitney Ave., Suite 303
Gretna, LA 70056
(504) 366-8025

JAY ALAN SEKULOW
Counsel of Record
COLBY M. MAY
STUART J. ROTH
JAMES M. HENDERSON, SR.
DAVID A. CORTMAN
AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Attorneys for the Petitioners

14pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

1. Introduction 1

2. Reply to Respondents' Characterization of the Facts and Proceedings 2

3. Conflicts in the Circuits 4

   a. Creation of a public forum 4

   b. Discriminatory exclusion of religious speech 4

      i. Tenth Circuit 5

      ii. Eighth Circuit 5

      iii. First, Third, and Seventh Circuits .. 6

      iv. Fourth and Ninth Circuits 6

4. Conflicts with Decisions of Supreme Court 6

   a. Free Speech 7

   b. Free Exercise 8

   c. Establishment Clause 9

d. Equal Protection Clause 9

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996) . . . 5

Good News Club v. Milford Central School, 202 F.3d 502 (2d Cir.), *cert. granted*, 121 S. Ct. 296 (2000) . . . 1

Good News Club v. Milford Central School, U.S. No. 99-2036 (argued Feb. 28, 2001) 1, 2, 6, 9, 10

Good News/Good Sports Club v. School District of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995) 5

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) 6, 9

Widmar v. Vincent, 454 U.S. 263 (1981) 7, 9

ARGUMENT

1. Introduction

This case presents the constitutional question whether a government body -- here, a school board -- may discriminatorily deny a community group the use of its facilities after hours, for an otherwise permissible meeting to discuss family and political issues, for the sole reason that the requested use would include expressive activity which the government deems to be "religious services or religious instruction." The issues in this case therefore overlap, to a large extent, the issues pending before this Court in *Good News Club v. Milford Central School*, U.S. No. 99-2036 (argued Feb. 28, 2001).

St. Tammany claims that the present case is "materially distinguishable" from *Good News Club*, but the reasons St. Tammany offers are meritless.

- St. Tammany claims that it "simply prohibits religious worship and instruction," Opp. at 14, but in *Good News Club* the exclusion was likewise of "religious instruction and prayer" or "worship," *see Good News Club v. Milford Central School*, 202 F.3d 502, 508, 510-11 (2d Cir.), *cert. granted*, 121 S. Ct. 296 (2000).

- St. Tammany claims that it "does not restrict . . . the discussion of subjects from a religious viewpoint," Opp. at 14, but the school in *Good News Club* made the same claim, *see Good News Club*, 202 F.3d at 507 (school denied use request because proposed activity was "the equivalent of religious worship . . . rather

than the expression of religious views or values on a secular subject matter").

- St. Tammany points out that the group in *Good News Club* had student members, Opp. at 14, but this distinction cuts in favor of the present petitioners: here, no credible defense argument can be made about somehow protecting "impressionable youth" from religion.

- St. Tammany insists that, unlike the school in *Good News Club*, it would allow after hours community use that involved *student* worship and religious instruction, but not *adult* worship and religious instruction. Opp. at 14-15. This assertion only highlights the complete irrationality of St. Tammany's policy.

2. Reply to Respondents' Characterization of the Facts and Proceedings

Petitioners Sally Campbell and the Louisiana Christian Coalition (LCC) requested the use of respondent St. Tammany Parish School Board's facilities[1] for an LCC meeting. The meeting was to be for discussion and instruction regarding family and political issues from a Christian point of view. Pet. at 6-7. The meeting would also include prayer and "praise and

[1]St. Tammany emphasizes the fact that petitioners originally requested use of an elementary school building. Opp. at 1, 14 n.5. But petitioners ultimately requested any of the more than sixty available facilities, and school officials admitted that the precise location was irrelevant to the denial of petitioners' requested use. *See* Pet. at 7 n.2; Ex. 7, Plffs' Exhibits.

worship music." Ex. 10, 11, Exhibits in Support of Plaintiffs' Motion for Summary Judgment (hereafter "Plffs' Exhibits").

St. Tammany denied petitioners' requested use, invoking St. Tammany's policy forbidding "religious services or religious instruction" on school premises. Pet. at 4, 7.[2]

St. Tammany has opened its facilities, by policy and practice, to a veritable cornucopia of community uses. Pet. at 3-5. St. Tammany asserts that *in practice* most uses were "activities of interest to students or parents." Opp. at 10. But St. Tammany cites no record support for this claim. Furthermore, this assertion is irrelevant. LCC meetings are no less "of interest to . . . parents" than are homeowners association meetings, plant society meetings, EPA meetings, and a host of other uses which St. Tammany permits in school facilities. *See* Pet. at 4-5. Moreover, St. Tammany's *policy* broadly authorizes "other uses pertaining to the welfare of the community," Pet. at 3, not just uses "of interest to students or parents." And in *practice*, the range of different uses allowed was extensive. Pet. at 4-5.

Petitioners challenged St. Tammany's prohibition on "religious services or religious instruction" both on its face and as applied. Verified Complaint at 12-19. After the district court ruled in favor of petitioners, the Fifth Circuit reversed, rejecting all of petitioners' arguments. Pet. at 8-15. Hence,

---

[2]St. Tammany claims that LCC is "a partisan political action group." Opp. at 1. By "partisan," St. Tammany apparently means advocating "from a Christian point of view." *Id.* It is undisputed, however, that LCC is a nonpartisan civic and educational organization. Decl. of Sally Campbell ¶ 5 (R. 483). Moreover, this claim was not the basis for denying LCC's requested use. Pet. at 7.

contrary to St. Tammany's intimation that only a facial challenge is before this Court, Opp. at 3, the present petition entails both a facial challenge to St. Tammany's policy and an "as applied" challenge to the denial of petitioners' requested use.

3. **Conflicts in the Circuits**

Petitioners identified two ways in which the decision below conflicts with the decisions of other federal courts of appeals. St. Tammany has failed to rebut the existence of these conflicts in the circuits.

a. **Creation of a public forum**

The decision below squarely conflicts with at least three other federal circuits on the question whether, by opening school facilities to outside groups after hours for "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community," a school creates a public forum for speech. Pet. at 21-24.

St. Tammany does not deny this conflict in the circuits. This conflict alone warrants review.

b. **Discriminatory exclusion of religious speech**

Contrary to the decision of the Fifth Circuit below, the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits have struck down as unconstitutional the discriminatory exclusion of private religious speech from government facilities. Pet. at 17-20. St. Tammany's effort to explain away this conflict is unpersuasive.

i. **Tenth Circuit**

St. Tammany does not even try to distinguish the Tenth Circuit's ruling in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996). The *Church on the Rock* court held unconstitutional the exclusion, from a government-opened forum, of "sectarian instruction and worship" -- virtually the identical exclusion at issue here.

ii. **Eighth Circuit**

St. Tammany gives no coherent explanation why a conflicting Eighth Circuit decision, *Good News/Good Sports Club v. School District of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995), is distinguishable. In *Good News/Good Sports*, as in the present case, a community group with a Christian perspective sought use of school facilities after hours for activities that included prayer, religious songs, and Bible reading. 28 F.3d at 1502. The Eighth Circuit assumed that the facilities in question were a nonpublic forum. *Id.* at 1505 n.6. Moreover, the use policy did not totally ban religious uses; rather, it banned such uses only from 3 to 6 p.m. on school days. *Id.* at 1503. The Eighth Circuit nevertheless held the exclusion of religiously oriented speech to be unconstitutional viewpoint discrimination. *Id.* at 1507, 1510. The decision below -- upholding the discriminatory exclusion from a government forum of private speakers' "religious services or religious instruction" -- is plainly irreconcilable with *Good News/Good Sports*.

iii. **First, Third, and Seventh Circuits**

St. Tammany claims that the conflicting decisions in the First, Third, and Seventh Circuits each involved a "complete ban" on religious uses, while St. Tammany has only a partial ban. Opp. at 4-6. But government discrimination against religious uses is no less invidious and anti-religious in nature -- and thus unconstitutional -- just because the government discrimination is less than comprehensive.

iv. **Fourth and Ninth Circuits**

St. Tammany argues that decisions in the Fourth Circuit and district courts within the Ninth Circuit involved public fora, but that begs the question -- on which an independent conflict exists, *see supra* § 3(a) -- whether St. Tammany has created a public forum. Furthermore, viewpoint discrimination (specifically, against religion) is unconstitutional regardless of whether the forum in question is public or nonpublic. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 391-94 (1993). *See also* Pet. at 25.

4. **Conflicts with Decisions of Supreme Court**

St. Tammany's exclusion of petitioners -- like the decision below -- rests heavily on the supposed constitutionality of a government-imposed distinction between "disseminating religious messages" (permitted by St. Tammany, Opp. at 4; Pet. at 4) and "religious worship or instruction" (forbidden by St. Tammany, Opp. at 3; Pet. at 4). The absurdity, incoherence, unworkability, and unconstitutionality of this supposed distinction has been briefed at length by the petitioners, and their amici, in the pending case of *Good News Club v. Milford*

Central School, U.S. No. 99-2036 (argued Feb. 28, 2001). Petitioners need not belabor the point, except to note that St. Tammany's proffered distinction cannot be squared with *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 272 n.11 (1981) (rejecting exclusion, from forum, of "religious worship and religious teaching," and specifically rejecting efforts to draw enforceable boundaries around that supposed category of speech).

Under St. Tammany's policy, community groups can use school facilities after hours to teach dog obedience to humans, but not human obedience to God. Users can pay homage to sports heroes, but not to Jesus Christ. Users can celebrate the wedding of Jane Q. Public, but not the Wedding of the Lamb. *See* Pet. at 4-5. Such blatant, unconstitutional discrimination against a religious viewpoint violates the Free Speech, Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution. Pet. § II.

a. **Free Speech**

St. Tammany argues that religious speakers do not have "superior" rights to other speakers. Opp. at 11. But petitioners seek only *equal* access. Here, "[i]t is *only religious* worship and instruction that is barred," Opp. at 11 (emphasis added); *secular* worship (e.g., adulation of movie stars, sports heroes, political personages, and historical figures like Abraham Lincoln or Martin Luther King, Jr.) and *secular* instruction (e.g., promotion of socialism, environmentalism, Freudianism, etc.) are permitted. This is classic viewpoint discrimination.

b. **Free Exercise**

St. Tammany claims, incredibly, that its policy is "neutral and of general application." Opp. at 12. But a ban on only *religious* instruction and *religious* worship is the antithesis of neutrality. Moreover, because outside community groups can use school facilities for religious services and instruction when *students* submit the request, Pet. at 6; Opp. at 13, 14-15,[3] the policy is not even generally applicable in its religious proscriptions.[4]

---

[3]St. Tammany claims that the student-initiated religious uses were pursuant to the Equal Access Act. Opp. at 13. This is false. The student religious uses were allowed under St. Tammany's community use policy -- the same policy under which petitioners sought access -- not its student club policy. Fielding Dep. at 10-12, 15-16; Ex. 25, Plffs' Exhibits. Moreover, these gatherings were open to the public. Fielding Dep. at 12-13, 15-16.

[4]St. Tammany claims for the first time in this litigation that, despite its express ban on "religious instruction," the St. Tammany policy only bars religious instruction "as part of a religious service." Opp. at 12-13. This novel reinterpretation of the policy, which first appeared in the Fifth Circuit's per curiam opinion denying rehearing, Pet. App. 38a-39a, has no basis in the record, *see* Pet. at 12 & n.8, 13 & n.9. St. Tammany has never previously embraced this reinterpretation of its policy. *See, e.g.*, Original Brief of Defendants/Appellants (5th Cir.) at 23 (policy forbids "religious worship *and/or* religious instruction") (emphasis added); Brady Dep. at 45 (defining prohibited "religious instruction" with no mention of any required connection to religious services); Monteleone Dep. at 41-42 (same). Nor would such a last-second rewrite solve St. Tammany's constitutional problems. On the contrary, this reinterpretation would aggravate the vagueness of the policy, would leave in place discrimination against a religious viewpoint, and would impose on school officials the task of deciding what is and is not a "religious service." Here, St. Tammany decided that petitioner LCC was engaged in a worship service because the LCC meeting to discuss family and political issues would include prayers and religious songs. Monteleone Dep. at 76-79; Brady Dep. at 39-43, 52-54. As the present case illustrates, "religious service" may be quite an elastic

(continued...)

c. **Establishment Clause**

St. Tammany claims that its exclusion of religious worship and instruction "cannot reasonably be seen as hostile towards religion" because St. Tammany excludes *all* religions equally, whether Christian, or "satanic or pagan," or something else. Opp. at 13. This Court has already rejected this argument: "That all religions and all uses for religious purposes are treated alike . . . does not answer the critical question whether it discriminates on the basis of viewpoint to [exclude] a religious standpoint [on a permitted subject]." *Lamb's Chapel*, 508 U.S. at 393.

d. **Equal Protection Clause**

St. Tammany offers no response to the conflict between the decision below and this Court's Equal Protection Clause jurisprudence. *See* Pet. at 29-30.

CONCLUSION

This Court should grant the petition for a writ of certiorari. In the alternative, this Court should either grant the petition and summarily reverse, *see* S. Ct. R. 16.1, or else hold this petition pending disposition of *Good News Club v. Milford Central School*, U.S. No. 99-2036, and then grant the present petition,

---

[4](...continued)
concept in the hands of government officials. Presumably the student meetings at issue in *Widmar v. Vincent*, 454 U.S. 263 (1981), would have been deemed a forbidden "religious service" under St. Tammany's policy. *See id.* at 265 n.2 ("A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences").

vacate the decision below, and remand for further proceedings consistent with this Court's opinion in *Good News Club*.

Respectfully submitted,

Walter M. Weber
American Center for
Law & Justice
5th Floor
1650 Diagonal Road
Alexandria, VA 22314
(703) 740-1450

Robert L. Marrero
Bowes & Marrero
Suite 303
401 Whitney Ave.
Gretna, LA 70056
(504) 366-8025

Jay Alan Sekulow
Counsel of Record
Colby M. May
Stuart J. Roth
James M. Henderson, Sr.
David A. Cortman
American Center for
Law & Justice
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Attorneys for the Petitioners

April 2, 2001